OHS Bill Update
National IES Branch meeting
28 - 30 April 2011
introduction
OHS ACT 85 of 1993

• The existing Act is known as the:  
  Occupational Health and Safety Act, Act 85 of 1993, as amended

• The current Act was therefore promulgated before the current Constitution of the Republic of South Africa.

• Newer Regulations have in the mean time been promulgated after the promulgation of the Constitutional Act, while the OHS Act has never been brought in line with it until today.
Not in Synch …

• Due to the “new” Regulations pursuing a newer, different concept or theme, different to that which existed with the coming into force of the existing OHS Act, i.e. self regulation and Occupational Health, the new Regulations are not in synch with the OHS Act and it has and is creating problems with the development of newer Regulations – old Regulations that are not standing the test for example is the Hazardous Chemical Substances Regulations …
Impact on other Govt. Departments

• In addition to the aforementioned, the current OHS Act has also created a problem as can be seen in Section 1(3)(b) in relation to a Presidential decree that was required to come out shortly after promulgation of this legislation that impacts on the South African Maritime Safety Authority’s (SAMSA) jurisdiction i.e. an incident that now occurs on a ship at the harbour, must be investigated by DoL - this however, should not be the case, as there is a clear distinction based on the Merchant Shipping Act and other legislation within the jurisdiction of the Department of Transport (and SAMSA) that shows their responsibility clearly.

• As things stand now we should also be investigating incidents on ships with them!
• So, in additional to all the other issues raised there are also X-Departmental imperatives that must be taken into consideration as well in relation to where our legislation, the OHS Act, finds itself.

• As it stands, and in terms of several communications received by me on this matter, it is clear that the current situation is creating confusion for our clients.
Really old legislation …

- Some Regulations that were in force went back as far as 1988 and while there may have been reviews from time to time, the Regulations did not address fundamental aspects as it should have in-line with an Act that should have taken lead from society/industry and international benchmarks, post our first democratic elections.
17 years down the line …

• We are now 17 years into our democracy and it is receiving the required attention in order to address the deficiencies.
Ultra vires …

- A new Regulation that was developed and which was sent to the State Law Advisers for their approval and which failed is the Globally Harmonised Systems Regulation.
- The Regulations was deemed to be “ultra-vires”.
• The current Act has been found to be lagging in certain areas and it was found necessary to review it for the reasons noted above.

• The existing OHS Act also introduced of **occupational health** as a new concept into industry – an area that was largely ignored or not given the attention that it required until recently
… The change …
Entrenching employer responsibility and accountability

- It is clear from the new Bill that the onus of the Act and the Regulations will be to ensure, in line with International trends, that employers take responsibility as they should or will and must, if required, face the consequences – and these are the consequences that we are hoping will deter them from perpetuating the wrong … year… after … year – small or big employer – single or multiple companies under the same employer
The new face of OHS/IES

• This does not mean that employers that seek assistance will be shown a closed door, on the contrary, those that need assistance and are serious about change will be given the necessary assistance and “shown” how to do the right things – while those employers who choose not to move in the direction that the Department is leading will like wise face the consequences that will be meted out.
The change

• When we go out to do inspections, audits or investigations – employers are at varying degrees of compliance (i.e. 40%; 80%; 95%) and therefore, depending on the type of sector and several other factors (i.e. pharmaceutical sector vs. the fishing sector or the motor industry sector vs. the woodwork manufacturing sector) may be a stone throw away from complying and may just require further awareness or education, etc for 100% compliance - how we leave that employer and workplace will determine not only the type of future relationship but also future compliance.

• It is also in our “after service” regime that we can start winning friends and in so doing ensure life long compliance!
• The OHS Act was introduced to ACOHS during the course of last year for review and ACOHS agreed and approved of the review.
So … Some key changes include … amongst others

- Administrative Management of OHS
  - Safety Management System and includes
  - Risk Management
  - Health and Safety Representatives and Committees
    - Responsibilities
    - appointments

- A total turnaround on the enforcement capability
  … which includes …
  - Administrative Fines

- Alignment of legislation
OHS Bill Review

• The Bill was reviewed during a Special sitting of Advisory Council for OHS in order to ensure that the appropriate changes were made to the OHS Act in line with the discussions and agreement of the tri-partite alliance.

• The Bill was also discussed at Head Office level and areas of concern were addressed during the sitting.
• The Bill was then given to Legal Services to ensure that it complies with all the legal requirements of legislative review and all areas that were required to be addressed were addressed.
Repealed

• The OHS Act 85 of 1993, as amended, it was determined, will now be repealed due to the number of changes effected.
Changes then include …
Some key areas for considerations include…

- Definitions
- The introduction of a Safety Management System - which is no longer inferred but rather defined
- Section 10 expanded upon to address deficiencies in terms of GHS and HCS
- Administrative Fines (“Spot Fines”)
- Substantial increases in penalties i.e. up to R5 000 000 and/or 5 years in prison (max.)
• “General duties of employers” expanded upon to increase responsibility of employers in relation to risk management on site

• “General duties of employers and self-employed persons to persons other than their employees” substantially expanded upon to ensure that there is adequate responsibility
• It is now entrenched in the new Bill that Employees’ have a right to leave a dangerous place of work
• Very little change has been effected to the old Section 16 “Chief Executive Officer charged with certain duties”
• Quite a bit of change has been effected to Section 17 in relation to health and safety representatives and in relation to “Negotiations and consultations on designation of health and safety representatives and establishment of Health and Safety committees”
• Some work has been done on “Functions of health and safety representatives”
Enforcement

- It should be noted the enforcement component for OHS has now been substantially beefed up … and … We are of the opinion that this could at least begin the kind of change that we envisage…
Lessons learnt

• All legislation to be sent to the State Law advisers prior to it being sent out for Public Comment and again prior to promulgation.

• All regulations will have to be brought in line with the key changes in the Act

• A guideline is a must to be published when the Bill is promulgated to ensure that all grey areas are addressed as far as possible.

• All unintended consequences will, as far as possible be dealt with during the Public Comment phase.
Thank you!